SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 580

WILKY CARRIER CORPORATION,

Petitioner,

vs.

DORIS YOUNG, A MINOR, BY EMIL O. YOUNG, HER FATHER AND NEXT FRIEND, AND EMIL O. YOUNG IN HIS OWN RIGHT; RAYMOND YOUNG, A MINOR, BY EMIL O. YOUNG, HIS FATHER AND NEXT FRIEND, AND EMIL O. YOUNG IN HIS OWN RIGHT; PAULINE YOUNG AND EMIL O. YOUNG,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of Pennsylvania was filed April 22, 1944 (R. 68). It is reported in *54 Fed. Supp. 912.*

The opinion of the Circuit Court of Appeals for the Third Circuit was filed July 26, 1945 (R. 85). It has not yet been reported.

Specification of Errors

If the writ of certiorari is issued petitioner will urge that the Circuit Court of Appeals erred:

(1) In holding that the law of Pennsylvania raises a presumption that a business vehicle was operated by the servant and on the business of a defendant by reason of the presence of his name on the vehicle when the pleadings and proofs showed that the vehicle was the sole property of a co-defendant whose name was also on the vehicle.

(2) In holding that where a voluntary dismissal, with prejudice, is entered in favor of the actor defendant, on the ground that no case can be made out against him, recovery may be had from another defendant.

Summary of Argument

(1) The Circuit Court of Appeals for the Third Circuit under *Erie Railroad* v. *Tompkins*, 58 Supreme Court 817, 304 U. S. 64 should have followed the law of Pennsylvania which holds that a plaintiff may not prejudice the adjudication of the rights of co-defendants by discontinuance, release or non-suit.

(2) The Circuit Court of Appeals should have applied the law of Pennsylvania which holds that a presumption must give way to an established fact and that the fact of ownership of a business vehicle alleged and admitted to be the property of one defendant precludes a presumption arising from the name of another defendant on the vehicle that it was operated by the servant and on the business of the latter.

Argument

First Question

The Supreme Court of Pennsylvania has held that a plaintiff may not be permitted to release a co-defendant or additional defendant in the course of trial by means of discontinuance or non-suit and that the Court is under duty either of striking off a discontinuance or of refusing a non-suit until the other defendant has offered evidence to show the liability and degree thereof asserted against the first defendant.

Shapiro v. *Philadelphia*, 306 Pa. 216, 159 A. 29;
Rau v. *Manko*, 341 Pa. 17, 17 A. 2d 422.

It is submitted that the Circuit Court of Appeals was required by the decision of this Court in *Erie Railroad* v. *Tompkins*, 58 Supreme Court 817, 304 U. S. 64 to apply this rule in dealing with the dismissal of the defendant Welty over the objection of the petitioner and that it was in error in applying a contrary rule that "the dismissal of Welty resided in the sound discretion of the Court under Rule 41a (2) F. R. C. P."

The petitioner was prejudiced by the dismissal in that his right to bring Welty into the proceeding as a third party defendant under Rule 14 had he not already been a party was lost through the bar of the Statute of Limitations. The right of the petitioner to bring Welty on the record is sustained by the cases.

Sussan v. *Strasser*, 36 Fed. Supp. 266;
Greenleaf v. *Huntington and Broadtop Railroad*, 3 F. R. D. 34;
Abraham v. *National Biscuit Co.*, 89 F. (2d) 266 (3 C. C. A.).

Second Question

The Circuit Court of Appeals has not correctly construed the law of Pennsylvania governing the presumption arising from the presence of a defendant's name on a business vehicle as set forth in *Hartig* v. *American Ice Co.*, 290 Pa. 21, and other Pennsylvania cases. It is held that this circumstance gives rise to a presumption that the defendant is the owner of the vehicle and the ensuing presumption that the vehicle is being used or operated on the business of the owner. In the present case the complaint alleged, Welty admitted and the evidence confirmed, that Welty was the owner of the vehicle involved. The establishment of this fact precluded any presumption that the truck was owned by any other person. *George Haiss Manufacturing Co.* v. *Link Belt Co.*, 50 Fed. (2d) 450.

In the absence of further presumption there was no evidence in this case upon which a finding of agency as against the petitioner could be supported. He was admittedly not the owner and it is submitted the law prohibits any presumption to the contrary. Since he was not the owner affirmative evidence would be required to show that the operator of the vehicle was his agent. There was concededly no such evidence. Therefore the finding of the Trial Court which was approved by the Circuit Court of Appeals that the petitioner was the "owner" in the sense of "lessee in exclusive possession of the vehicle" is unsupported by any evidence or admissible presumption.

The foregoing proposition of law is in accord with the decision of the Third Circuit Court of Appeals in *Venuto* v. *Robinson*, 118 F. (2d) 679 on an identical state of facts. This decision was the basis of the petitioner's argument under this head but was neither discussed nor cited in the opinion of the Circuit Court of Appeals, although its own case. In that case a trailer bore the name of one of the

defendants but the plaintiffs conceded that it was owned by the other. On that state of facts the Circuit Court of Appeals said (679, 680):

> "Although the trailer bore the name of the Ross Company thereon, it was conceded by the plaintiffs that Robinson was the owner of the tractor and trailer. Since a finding of agency arising out of the name on a vehicle depends upon the inference that the vehicle is owned by the person whose name appears thereon, *Wigmore on Evidence, 3d. Ed. Sec. 2501a,* the concession of ownership in Robinson removes any evidential value from the fact that Ross' name was on the vehicle."

The District Court observes in its opinion in the present case the absence of a Pennsylvania case involving more than one name on a business vehicle (54 F. Supp. 912). The District Court continues at page 914 as follows:

> "The rationale of the Pennsylvania rule was succinctly stated in *Readshaw v. Montgomery, 1933, 313 Pa. 206 at page 208, 169 A. 135 at page 136.* Said the Court: 'The rationale of this rule is that such facts give rise to an inference that the vehicle was being used for the purposes of the defendant. *Business vehicles are generally used in the business of the owner,* and when it is shown that the vehicle was a business vehicle and that it bore the trade-name of the defendant, it is a fair inference that the vehicle was owned by the defendant, that the driver was his servant, and that it was being used for the purposes of defendant's business. Where, upon a consideration of plaintiff's whole case and anything in defendant's case which might help to create such an inference, no such inference can arise, the doctrine of the cases cited has no application . . . .'" (Emphasis supplied.) (R. 69), 54 Fed. Supp. 912, 914.

This reasoning coincides with that of *Wigmore on Evidence,* 3d Ed. Vol. IX, Sec. 2510 a, pp. 399 & 400, as follows:

> "Where damage is done by the tortious act of the driver of a vehicle, and the injured person sues the

> owner of the vehicle, who was not the driver, it is a necessary part of the plaintiff's case that the *driver* was an *agent* of the owner, and that he was acting *at the time within the scope* of his employment. May these two facts be presumed from the fact of ownership? (Emphasis in the text.)
>
> "The answer should be in the affirmative * * *."

The Circuit Court of Appeals admits in its opinion that the District Court could not have found that petitioner was the owner of the vehicle. However, the opinion endeavors to explain away such deficiency by holding that in this case "owner" should be defined as "lessee in exclusive possession." The language is as follows:

> "Two of the conclusions above mentioned are based upon the appearance of the defendant's name on the vehicle, to wit, the conclusion that defendant was the 'owner' as stated in the opinion, which is taken to mean lessee in exclusive possession, and the conclusion that the vehicle was on defendant's business at the time the injuries were sustained." (R. 86.)

Not only is there no reason to hold that petitioner was in exclusive possession; there is every reason to find that Welty was in exclusive possession.

It is submitted that the application of the law stated in the *Venuto* case and in the opinion of the District Court above quoted will necessitate an opposite result to the one reached in the Courts below.

The presumption which is the exclusive foundation of the controlling fact found by the District Court would have been wholly unavailable and would have demanded the production of evidence of agency which is altogether absent from this record. The conversion of terms by reference to the petitioner as "lessee in exclusive possession" is equally devoid of support either in presumption, evidence or law.

It may be added that the circumstance by which liability was found in the *Venuto* case because of the presence of an Interstate Commerce Commission Certificate issued to the defendant is no part of the instant case. Moreover, the rule of vicarious liability applied in the *Venuto* case in holding the defendant liable for the acts of an independent contractor resulted from the application of New Jersey law, with which the law of Pennsylvania is not in accord. The statement of this Rule in Restatement of Torts, Secs. 416 and 417 is accompanied by a large body of Pennsylvania cases cited to the contrary of the Rule:

Allen v. *Willard,* 57 Pa. 374;
Wray v. *Evans,* 80 Pa. 102;
Chartiers Valley Gas Co. v. *Lynch* 118 Pa. 362;
Jackman v. *Rosenbaum Co.,* 263 Pa. 158;
Silveus v. *Grossman,* 307 Pa. 272.

Conclusion

For the reasons above stated, in view of the decision of the Circuit Court of Appeals in a way probably in conflict with local decisions and in conflict with the decision of another Circuit Court of Appeals, imposing liability in situations unauthorized under the law, it is urged that this petition for a writ of certiorari be granted.

Respectfully,

JOHN J. MCDEVITT, JR.,
Counsel for Petitioner.

Philadelphia, Pa., November 3, 1945.